93-590

Supreme Court, U.S.
FILED
OCT 1 1993
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No. _____

**IN THE SUPREME COURT OF THE UNITED STATES**
October Term 1992

Edward Bontkowski,

Petitioner,

vs.

First National Bank of Cicero,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED FOR REVIEW

Does a civil RICO claim accrue and the 4 year statute of limitations begin to run when the plaintiff becomes aware of each element comprising a RICO claim (including the racketeering act which injured him and the source of his injury), as the United States Court of Appeals for the Third Circuit held in Keystone Insurance Co. v. Houghton 863 F 2d 1125 (3rd Cir. 1988) or should accrual begin when the plaintiff should have discovered his injury (even though he does not know that the injury was caused by a racketeering act) as the United States Court of Appeals for the Seventh Circuit held in this case Bontkowski v. First National Bank of Cicero 998 F 2d 459 (7th Cir. 1993) and in McCool v. Strada Oil Co., 972 F 2d 1452 (7th Cir. 1992)?

## PARTIES

1. Edward Bontkowski was the plaintiff in the United States District Court for the Northern District of Illinois, appellant in the United States Court of Appeals for the Seventh Circuit and petitioner for Writ of Certiorari in this Court.

2. First National Bank of Cicero was the defendant in the United States District Court for the Northern District of Illinois, appellee in the United States Court of Appeals for the Seventh Circuit and is respondent in this Court.

TABLE OF CONTENTS

QUESTION PRESENTED

PARTIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPORTS OF OPINIONS . . . . . 1

JURISDICTION . . . . . .2

TEXT OF 18USC1964(c);15USC15b . . . 3

STATEMENT OF THE CASE . . . . . 4

REASONS FOR GRANTING THE WRIT . . .13

CONCLUSION . . . . . 21

JUDGMENTS AND OPINIONS BELOW . . . 22

TABLE OF AUTHORITIES

Agency Holding Corporation v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987). . . . . 13

Bankers Trust Co. v. Rhoades 859 F 2d 1096 (2nd Cir. 1988) . . . . . 19

Bath v. Bushkin, Gaims, Gaines & Jones 913 F 2d 817 (10th Cir. 1990). . . .20

Bivens Gardens Office Building, Inc. v. Barrett Bank 906 F 2d 1546 (11th Cir. 1990) . . . . . .20

Bontkowski v. First National Bank of Cicero 998 F 2d 459 (7th Cir. 1993) . . . . . .1,8,12,16,18

Compton v. Ide 732 F 2d 1429 (9th Cir. 1984). . . . . 20

First National Bank of Cicero v. Lewco Securities Corp. 860 F 2d 1407 (7th Cir. 1988). . . . . .4,16

Granite Falls Bank v. Henrikson 924 F 2d 150 (8th Cir. 1991). . . . . .20

McCool v. Strada Oil Company 972 F 2d 1452 (7th Cir. 1992) . . . . . 11,18

Keystone v. Houghton 863 F 2d 1125 (3rd Cir. 1988). . . . . 11,14,18,19

Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.828 F 2d 211 (4th Cir. 1987) . . . . . ..19

La Porte Construction Co. v. Bayshore National Bank 805 F 2d 1254 (5th Cir. 1986) . . . . . .19

Rodriguez v. Banco Central Corp. 917 F 2d 664 (1st Cir. 1990) . . . . . 19

United States v. Brunn 809 F 2d 397 (7th Cir.1987) . . . . . 7

## DECISIONS BELOW

The opinion of the Court of Appeals is reported Bontkowski v. First National Bank of Cicero 998 F 2d 459 (7th Cir. 1993). The opinion of the district court is not reported.

## JURISDICTION

The United States Court of Appeals entered the judgment sought to be reviewed on July 1, 1993. Rehearing and Suggestion for rehearing En Banc was denied August 17, 1993. No extension of time within which to file this petition for certiorari was sought or granted. Petitioner seeks to invoke this Court's jurisdiction under 28 USC Sec. 1293 by filing this petition by mail on or before September 29, 1993 and within 90 days of the July 1, 1993 judgment of the United States Court of Appeals as required by rule 13.1 of this Court.

## STATUTES

18 USC Sec. 1964(c) provides: "(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

15 USC Sec. 15b provides: "Any action to enforce any cause of action under sections 15, 15a or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

## STATEMENT OF THE CASE

Petitioner filed his civil RICO complaint November 12, 1991.

During 1981 and 1982 Ronald Berkowitz and William Giova were associated together in fact to engage in loan brokerage and financial transactions. The association in fact was the alleged enterprise.(complaint paragraph 2) Through a pattern of racketeering activity the defendant First National Bank of Cicero through its agent and vice-president William Giova participated in the affairs of the enterprise. (complaint paragraph 7 and First National Bank of Cicero v. Lewco Securities Corp. 860 F 2d 1407 (7th Cir. 1988).

Defendant committed its first act of racketeering on February 26, 1982 when it committed wire fraud. On this date the bank phoned Bontkowski and informed him that he should come to the bank to process a loan he previously applied for. This loan had been arranged for by Berkowitz and Giova and was to be secured by certain bonds supplied by Berkowitz to the bank.

On or about February 26, 1982 William Giova, an officer of defendant First National Bank of Cicero, said to the Bontkowski that the bonds [Industrial Development Corporation of Corpus Christi Texas Bonds] had been checked by Mimi [a bank employee] and the bonds were alright for use as collateral. In fact, unknown to Bontkowski, the bonds were stolen.

Bontkowski did not learn that the Giova's statement was false and fraudulent until 1988 when Bontkowski first saw an affidavit of Marylin Osborne, an employee of Securities Information Center, 65 Williams Street, Suite 150, Wellesley, MA 02181. That affidavit asserted that no employee of the First National Bank of Cicero had checked with the Securities Information Center to determine if the Industrial Development Corporation Bonds were reported lost or stolen.

Plaintiff's complaint alleges additional acts of racketeering were committed on March 26, 1982 and on April 6, 1982. On both of these dates the bank through Giova knowingly accepted stolen securities as collateral for loans arranged by Berkowitz. Both of these

loans were made to David Brunn. See United States v. Brunn 809 F 2d 397 (7th Cir.1987)

In June 1982 the Federal Bureau of Investigation seized the stolen collateral from the bank. (complaint paragraph 9) In August 1982 the bank call its loan and demanded $480,000 from Bontkowski. (complaint paragraph 10) As a result of calling the loan Bontkowski and his business M.P. Cartage, Inc. were forced out of business and into bankruptcy. (complaint paragraph 12) As a result of his involvement in the loan transaction, Bontkowski and seven other defendants including Giova, Berkowitz and Brunn were indicted, 84 CR 345 N.D. IL. Bontkowski plead guilty to two counts of bank fraud and was imprisoned. (complaint paragraph 13) Bontkowski

collaterally attacked his plea of guilty in a petition pursuant to 28 USC Sec. 2255. The district court denied the petition but the 7th Circuit remanded the case and held that because Bontkowski did not know the bonds were stolen, there was no factual basis for the guilty plea. Bontkowski v. United States 850 F 2d 306, 314-15 (7th Cir. 1988). After the Seventh Circuit's remand the district court vacated Bontkowski's bank fraud conviction. United States v. Bontkowski 85 C 08201 (N.D. Ill. December 9, 1988).

From mid-1982 onward Bontkowski sought the advice of counsel concerning his rights and obligations toward the First National Bank. Until 1988 no attorney advised Bontkowski that he had any right of action against the bank. Until 1988 all counsel advised

Bontkowski that any action must wait until he no longer stood convicted of mis-application of bank funds.(Bontkowski affidavit)

In 1988 Alan Weisman withdrew from the case because the bank threatened to seek sanctions against him and because the bank claimed that it had evidence that showed that the bank committed no wrong and evidence that showed that Bontkowski was guilty of fraud.(Bontkowski affidavit)

Bontkowski promptly retained John Dienner III who was required to withdraw on February 5, 1990 because he represented a claimant in a RICO case against the First National Bank of Cicero and the settlement in that case was confidential and he was duty bound not to disclose the settlement terms or conditions of that other

case.(Bontkowski affidavit)

In September 1990 Bontkowski retained William J. Stevens who advised the Petitioner that he could take no action on the Bontkowski's case until he had completed his duties as appointed counsel under the Criminal Justice Act for an alleged member of the El Rukn organization.(Bontkowski affidavit)

Bontkowski's ability to investigate his rights against the bank was hampered by his incarceration August 1984 through August 1987 (except for 90 days in 1985 when he was on bond).

Bontkowski did not know that his incarnation was due only to his transaction with the bank until May 1989 when judge Plunkett placed him on probation in an unrelated case 84 CR 598.(Bontkowski affidavit) The district court had originally sentenced

Bontkowski to concurrent prison terms for the bank fraud and the unrelated case. Once the bank fraud conviction was vacated the court resentenced Bontkowski to probation on the unrelated offense. The re-sentencing occurred in May of 1989 and until the re-sentencing it was not clear that the bank fraud conviction alone was the cause of Bontkowski's imprisonment.

The district court granted the bank's motion to dismiss and held that the complaint was not filed with 4 years of the last predicate act and was barred by limitations. While the appeal of this case was pending, the 7th Circuit decided McCool v. Strada Oil Company 972 F 2d 1452 (7th Cir. 1992) which rejected the 3rd Circuit's reasoning in Keystone v. Houghton 863 F 2d 1125 (3rd Cir. 1988) and adopted a discovery of

plaintiff's injury accrual rule for civil RICO. The Seventh Circuit followed McCool and affirmed the dismissal of the Petitioner's complaint on limitations grounds. Bontkowski v. First National Bank of Cicero 998 F 2d 459 (7th Cir. 1993). Petitioner now seeks certiorari to resolve the conflict among the circuits and reverse the dismissal of his complaint.

## REASONS FOR GRANTING THE WRIT

In Agency Holding Corporation v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) this Court held that civil actions brought under the Racketeering Influenced and Corrupt Organizations Act (RICO) 18 USC Sec. 1964(c) are subject to the statute of limitations governing civil enforcement of the Clayton Act 15 USC Sec. 15b. The Court held that a civil RICO suit must be brought within 4 years of the time when the cause of action accrues. 483 U.S. at 156. Since Malley-Duff filed his suit within 4 years of the time when the defendant terminated him, the court had no occasion to decide what makes the limitation period start to run.

Petitioner contends that of all of the formulations of RICO accrual it appears to the petitioner that the Third Circuit's formulation in Keystone Insurance Co. v. Houghton 863 F 2d 1125 (3rd Cir. 1988) best accommodates the complexities of the RICO statute. Under the Keystone formulation Bontkowski's claim would not be barred. In Keystone Insurance Co. v. Houghton 863 F 2d 1125 (3rd Cir. 1988) the court held:

The rule which we announce provides that the limitations period for civil RICO runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The

last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."[863

F 2d at 1126]....It is generally the case that a claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of injury, not when the potential claimant knows or should know that the injury constitutes a legal wrong. [863 F 2d at 1127]..... Given the unique elements required for a RICO claim, awareness that <u>each element</u> comprising a RICO claim is present is crucial while cognizance of the <u>legal</u> implication of these facts, that is, that there is a civil RICO cause of action is irrelevant.[863 F 2d at 1128]....It would appear fundamental that the four-year statute of limitations for civil RICO may not begin to run until each of the elements of the cause of action exist. [863 F 2d at 1130]

Although Bontkowski first learned of his injury when the bank called his loan, the source of the injury (<u>i.e.</u>the bank) and the fact that the bank had committed a wire fraud upon him were not and should not have been known to him until 1988. The fact that the bonds were stolen was a sufficient basis for the FBI to seize the bonds. For all that Bontkowski knew or should have known,

Giova could have been telling the truth about checking on the bonds in February 1982. The fact that Giova lied on behalf of the bank and that the bank had committed wire fraud--one of the kinds of offenses which qualify as predicate acts as part of a pattern of racketeering activity--did not come to light until 1988. The bank vigorously contended that it was not responsible for Giova's acts. First National Bank of Cicero v. Lewco Securities Corp. 860 F 2d 1407 (7th Cir. 1988) It was only in 1988 that Bontkowski learned that the bonds had been reported stolen before Giova represented that the bonds had been checked and it was in 1988 that Bontkowski learned for the first time that the bank made no inquiry of the Securities Information Center. In short until 1988 Bontkowski had no knowledge

of facts essential to each element of his RICO claim. In particular he did not know that he was a victim of the bank's wire fraud and thus could not know that his injury resulted from a pattern of racketeering activity.

It was not until May of 1989 that Bontkowski knew or should have known that his injury to business or property resulting from his imprisonment was in fact due to the bank's RICO violation. Bontkowski was originally sentenced to concurrent time on the bank fraud case and an unrelated case. Only when he was re-sentenced to probation on the unrelated case could he have known that his imprisonment was due only to the bank fraud case and the bank's RICO violation. Since this knowledge first became available to Bontkowski in May 1989, under the knew or should have

known of the last RICO injury rule Bontkowski should have been afforded until May of 1993 to bring his case.

In McCool v. Strada Oil Co. 972 F 2d 1452 (7th Cir. 1992) the 7th Circuit rejected the Keystone rule and held that a civil RICO claim accrues when the plaintiff should have discovered her injury even if she has not yet discovered the pattern of racketeering activity. 972 F 2d at 1465. The 7th Circuit in McCool noted that the doctrine of equitable tolling would delay the running of the statute of limitations but not the accrual of the claim. However, the 7th Circuit refused to equitably toll the statute of limitations Bontkowski v. First National Bank of Cicero 998 F 2d 459, 462 (7th Cir. 1993)

The basic unfairness of the 7th

Circuit's accrual rule is that the statute of limitations expires before the plaintiff knows that she is the victim of a racketeering act. She cannot plead and prove a RICO cause of action unless she can plead and prove a pattern of racketeering activity including at least 2 racketeering acts. Here the wire fraud was unknown to Bontkowski until 1988--more than 4 years after his first injury.

The Courts of Appeals do not have a uniform approach to civil RICO accrual: Rodriquez v. Banco Central Corp. 917 F 2d 664 (1st Cir. 1990); Bankers Trust Co. v. Rhoades 859 F 2d 1096 (2nd Cir. 1988); Keystone v. Houghton 863 F 2d 1125 (3rd Cir. 1988); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.828 F 2d 211 (4th Cir. 1987); La Porte Construction Co. v. Bayshore National

Bank 805 F 2d 1254 (5th Cir. 1986); Granite Falls Bank v. Henrikson 924 F 2d 150 (8th Cir. 1991); Compton v. Ide 732 F 2d 1429 (9th Cir. 1984); Bath v. Bushkin, Gaims, Gaines & Jones 913 F 2d 817 (10th Cir. 1990); Bivens Gardens Office Building, Inc. v. Barrett Bank 906 F 2d 1546 (11th Cir. 1990).

## CONCLUSION

For the foregoing reasons the petitioner asks this court to grant its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and upon review reverse the judgment of the Court of Appeals.

Respectfully submitted,

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In the

# United States Court of Appeals

## For the Seventh Circuit

998 F 2d 459

No. 92-1654

EDWARD BONTKOWSKI,

*Plaintiff-Appellant,*

*v.*

FIRST NATIONAL BANK OF CICERO,

*Defendant-Appellee.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 7223—**Charles P. Kocoras,** *Judge.*

ARGUED JANUARY 25, 1993—DECIDED JULY 1, 1993

998 F 2d at 460

Before CUDAHY and FLAUM, *Circuit Judges*, and MIHM, *District Judge.**

CUDAHY, *Circuit Judge.* The plaintiff, Edward Bontkowski, filed a one-count action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, against First National Bank of Cicero, alleging a pattern of racketeering that ultimately forced Bontkowski's trucking company into bankruptcy. First National moved to dismiss the case, arguing that Bontkowski's claim was time-barred by the four-year statute of

* The Honorable Michael M. Mihm, Chief Judge of the United States District Court for the Central District of Illinois, is sitting by designation.

limitations for civil RICO claims. The district court granted the motion, finding the claim barred under the "last predicate act" rule of RICO accrual. Applying a different accrual rule dictated by this court's decision in *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992), we affirm.

I.

This case has its roots in a conspiracy charge involving the plaintiff, Edward Bontkowski, and seven other men who allegedly conspired to defraud the defendant, First National Bank of Cicero. Ronald Berkovitz, through a bank officer named William Giova, brokered bank loans to individuals in return for a fee taken from the loan proceeds. Bontkowski was one of Berkovitz's customers, and Berkovitz arranged for Bontkowski to obtain quick financing for his trucking company. On or about February 25, 1982, Berkovitz sent Bontkowski to Giova, where Bontkowski obtained two loans, for $370,000 and $100,000, respectively. Bontkowski signed a note for the $370,000 loan and presented as collateral bearer bonds he had received from Berkovitz. The bonds, issued by the Industrial Development Corp. of Corpus Christi, were stolen. Although Bontkowski was aware that a portion of the loans was to be paid to Berkovitz, he apparently did not know that the bonds he used as collateral were stolen.

Berkovitz and Giova had engaged in a series of such loan transactions before bank officers discovered that the bonds were stolen. Federal agents seized the bonds and the bank demanded the $470,000 in loans it had made to Bontkowski, forcing Bontkowski's business into bankruptcy. In April 1984, Berkovitz, Giova, Bontkowski and five others were indicted in a twenty-five count indictment for their involvement in the loan scheme.

Bontkowski pleaded guilty to two counts of bank fraud, admitting that when he applied for the two loans he knew that Berkovitz would receive part of the proceeds. Bontkowski received four-year concurrent sentences on each count. On appeal, this court remanded Bontkowski's bank fraud conviction on the grounds that the government was

required to prove that Bontkowski *knew* the bonds were stolen, *Bontkowski v. United States*, 850 F.2d 306, 314-15 (7th Cir. 1988), and the district court ultimately vacated that conviction.[1]

Nearly two years after his conviction was vacated, Bontkowski filed this civil RICO action against First National on November 11, 1991. Bontkowski alleges that First National committed its first act of racketeering—wire fraud—through its vice president, Giova, on February 26, 1982, when Giova phoned Bontkowski to inform him that he should come to the bank to process a loan he had previously applied for. Bontkowski maintains that Giova knowingly and fraudulently informed him that First National had checked with the Securities Information Center and that the bonds were legitimate collateral. Bontkowski's complaint alleges further acts of racketeering on March 26 and April 6, 1982, when Giova knowingly accepted stolen securities as collateral for loans that Berkovitz arranged for David Bruun, who is not a party to this action.

at 461

First National moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) as barred by the statute of limitations. The district court granted the motion, concluding that Bontkowski's RICO action is untimely under the last predicate act rule[2] and that equitable tolling principles cannot salvage the suit. Bontkowski appeals.

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[1] This court remanded Bontkowski's bank fraud conviction in light of the decision in *United States v. Bruun*, 809 F.2d 397 (7th Cir. 1987), which reversed the conviction of David Bruun, one of the seven men indicted in this scheme, because there was no evidence introduced at trial that Bruun knew that the securities he received from Berkovitz were stolen. *Id.* at 411.

[2] The last predicate act rule provides that the statute begins to run from the date of the last alleged act of racketeering activity. The district judge acknowledged a disagreement among circuits and within the Northern District of Illinois as to when the statute of limitations accrues in civil RICO cases, but concluded that "[i]n the absence of any Supreme Court or Seventh Circuit directive, we remain committed to the last predicate act rule." Mem. Op. at 6.

## II.

When considering a defendant's motion to dismiss, we view the complaint's allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). We take as true all well-pleaded facts and allegations in the plaintiff's complaint, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987), and the plaintiff is entitled to all reasonable inferences that can be drawn from the complaint. *Ellsworth v. Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

RICO makes unlawful various activities associated with the operation of an "enterprise" by means of a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(d). "Racketeering" includes wire and mail fraud, 18 U.S.C. § 1961(1), and "pattern of racketeering activity" means "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Courts have jurisdiction to enforce RICO under 18 U.S.C. § 1964, which allows "any person injured in his business or property by reason of a violation of section 1962" to sue to recover treble damages and attorney's fees.

Since the time that the district court applied the "last predicate act" rule of RICO accrual to this case, this court has rejected that rule in favor of the so-called majority rule set forth in *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992). Under the rule adopted in *McCool*, "a RICO claim accrues when the plaintiff discovers her injury, even if she has not yet discovered the pattern of racketeering." *Id.* at 1465. Although Bontkowski contends he was unaware until 1988 that the bank had committed a wire fraud upon him,[3] he admits that he first learned of his

[3] Bontkowski maintains that he did not learn that Giova's statement regarding the bonds' legitimacy was false and fraudulent until 1988, when he first saw the affidavit of a Securities Information

(Footnote continued on following page)

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Pg. 5

was false. He also contends that his incarceration for much of the time from August 1984 through August 1987 hindered his ability to investigate the case.

We agree with the district court, however, that there is no factual basis for Bontkowski's assertion that a reasonable person in his position would not have known until 1988 of a possible violation of the law. Presumably Bontkowski had enough information to suspect that his legal rights had been infringed when the government seized the stolen bonds from First National in 1982 and forced his business into bankruptcy. If that series of events somehow failed to put Bontkowski on notice, certainly a reasonable person in his position would have understood that he *possibly* had a claim against First National when he and the others, including Giova, First National's vice president, were indicted for banking violations.[4] In spite of his incarceration for part of the time period at issue, with due diligence Bontkowski reasonably should have been able to garner the necessary information bearing on his RICO claim.

Finally, Bontkowski argues that his claim was not ripe because until his bank fraud conviction was vacated he stood *in pari delicto* with the bank and any civil claim against the bank was subject to that defense. The district court stated that Bontkowski should have filed his RICO action before the vacation of his sentence and had a court determine whether he was subject to the *in pari delicto* defense; then, if the court dismissed the action, Bontkowski could have filed a rule 60(b) motion after his conviction was vacated. Fed. R. Civ. P. 60(b) (providing for relief from judgments for, *inter alia*, mistakes and newly discovered evidence). Bontkowski argues that his lawyers advised him that he could not sue the bank unless his

[4] As this court has held, the plaintiff, by the exercise of reasonable diligence, must only have discovered that the defendant engaged in a "possible violation" of the law. *Cada*, 920 F.2d at 451 (stressing that "[t]he qualification 'possible' is important").

criminal conviction was vacated, and contends that the bank was serious about pressing the *in pari delicto* defense and seeking rule 11 sanctions for meritless claims.

We do not believe *in pari delicto* applies in this case: the courts considering the previous proceedings did not find First National guilty of any wrongdoing, and the object of the conspiracy was to defraud the bank. *United States v. Bruun*, 809 F.2d 397, 405 (7th Cir. 1987). Moreover, even if the *in pari delicto* defense did apply, we agree with the district court that a rule requiring courts to discount time periods during which the prospective plaintiff is subject to the *in pari delicto* defense goes well beyond the positions courts have taken regarding statute of limitations accrual. We reject the argument on these grounds.

III.

The plaintiff's action is barred by the four-year statute of limitations, and his equitable tolling and *in pari delicto* arguments lack merit. For the foregoing reasons, we AFFIRM the district court's dismissal of the plaintiff's action.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-1-93

United States District Court

Northern District of Illinois

Eastern Division

Edward Bontkowski

Judgment in a Civil Case

v.

First National Bank of Cicero

Case Number 91 C 7223

Decision by Court. This action came to trial or hearing before the Court. The issues have been heard and a decision rendered. It is ordered and adjudged that plaintiff's complaint is dismissed. Each party to take nothing. Judgment entered.

November 29, 1992 H. Stuart Cunningham,

Date Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

| | | |
|---|---|---|
| EDWARD BONTKOWSKI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | 91 C 7223 |
| v. | ) | |
| | ) | |
| FIRST NATIONAL BANK OF CICERO, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION**

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, we grant defendant;s motion.

**BACKGROUND**

Plaintiff, Edward Bontkowski ("Bontkowski"), filed this one count RICO action against First National Bank of Cicero ("National"). Bontkowski contends that National violated 18

U.S.C.A. Sec. 1962(c) (West 1984(. In order to prove a violation of section 1962(c), National [sic. Bontkowski] must prove, inter alia, that National engaged in a "pattern of racketeering activity." Id.

Bontkowski has pleaded allegations which, if proven, would amount to a pattern of racketeering activity within the meaning of section 1962(c). Bontkowski contends that National's Vice President, William Giova ("Giova"), and Ronald Berkowitz ("Berkowitz") were associates in a loan brokerage business. According [end of page 1 beginning page 2] to the complaint, Berkowitz and Giova regularly arranged for customers to obtain loans from National in exchange for a portion of the customers' loan proceeds.

Bontkowski claims that National, through its agent Giova, committed its first act of racketeering on February 26, 1982 when it allegedly committed wire fraud. It was on this date that National phoned Bontkowski and informed him that he should come to the bank to process a loan he previously applied for. This loan had been arranged for by the loan brokerage business and was to be secured by certain bonds supplied to National by Berkowitz. According to Bontkowski, Giova knowingly and fraudulently informed Bontkowski that National had checked with the Securities Information Center and that the bonds were not reported as missing, lost or stolen and therefore were legitimate collateral. In fact, unknown to Bontkowski, the bonds were stolen.

The complaint further alleges that additional acts of racketeering activity occurred on March 26, 1982 and April 6, 1982. On both of these dates, National, through Giova, allegedly knowingly accepted stolen securities as collateral for loans arranged by Berkowitz. Both of these loans were made to David Brunn ("Brunn") who is not a party to this action.

In June of 1992, the Federal Bureau of Investigation seized the stolen collateral from National. As a result, National called $480,000 of its loan to Bontkowski. Bontkowski contends that National's calling of his loan caused him and his business, M.P. Cartage, Inc., to file for bankruptcy.

As a result of his involvement in the loan transaction, Bontkowski and seven other defendants including Giova, Berkowitz, and Brunn were indicted. [end

of page 2 beginning of page 3] Bontkowski pleaded guilty to two counts of bank fraud and was imprisoned. The Seventh Circuit, however, concluded that in order to find Bontkowski guilty of aiding and abetting the misapplication of bank funds, the government was required to prove that he knew that the bonds were stolen. Bontkowski v. United States, 850 F 2d 306, 314-15 (7th Cir. 1988). After the Seventh Circuit's remand, the district court vacated Bontkowski's bank fraud conviction. United States v. Bontkowski, No. 85 C 08291 (N.D. Ill. Dec. 9, 1988). Almost two years after the vacation of his conviction, on November 11, 1991, Bontkowski filed his civil RICO action against National.

In response, National has filed a 12(b)(6) motion to dismiss. National contends that Bontkowski's civil RICO

action is barred by the statute of limitations. Bontkowski disagrees and presents two arguments against dismissal. First, he contends that the statute of limitations has not run. Second, and in the alternative, Bontkowski claims that the statute of limitations was subject to equitable tolling, and therefore is timely. Before discussing the merits of National's motion, we must address the appropriate 12(b)(6) standard.

**DISCUSSION**

A. Rule 12(b)(6) Standard

In order to have a claim dismissed under Rule 12(b)(6), the moving party must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Under the [end of page 3 beginning of page 4] "simplified notice pleading" of the

Federal Rules of Civil Procedure, the complaint's allegations should be construed liberally , and "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S.41, 46 (1957); see also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

When considering a defendant's motion to dismiss, the court must view the complaint's allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 69, 73 (1974);; Conley, 355 U.S. at 45. All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true, Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F 2d 732, 733 (7th Cir. 1986), cert. denied. 482 U.S. 915

(1987), and the plaintiff is entitled to all reasonable inferences that can be drawn therefrom. Ellsworth v. Racine, 774 F 2d 182, 182 (7th Cir. 1985), cert. denied 475 U.S. 1047 (1986). We must address National's motion with this standard in mind.

B. Statute of Limitations

National's sole argument in support of its 12(b)(6) motion is that Bontkowski's action is barred by the statute of limitations. Both parties agree that the statute of limitations for this RICO action is four years. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S.143, 156 (1987). A disagreement exists,[end of page 4 beginning of page 5] however, as to when the statute of limitations accrues. We conclude that the statute began to run on the date of the last alleged act of racketeering activity.

This Court has long held that the "last predicate act" rule governs when the statute of limitations runs for civil RICO cases. County of Cook v. Berger, 648 F. Supp. 433 (N.D. Ill. 1986) (Kocoras, J.). This rule provides that the statute begins to run from the date of the last alleged act of racketeering activity. Id. at 434. While the Seventh Circuit has not spoken on this issue, a number of other courts in this district have adopted such a rule. See Norris v. Wirtz, 703 F.Supp. 1322, 1326 (N.D. Ill. 1989)(Marovich, J.); Citicorp Savings v. Streit, 84 C 7471 1987 WL 9318 (N.D.Ill 1987)(McGarr, J.); Newman v. Wanland, 651 F.Supp. 20, 22 (N.D.Ill.1986)(Williams,J.). Agreement within this district, however, is not universal. See Harer-Wyman Co. v. Connecticut General Life Insur. Co., No. 86 C 9595, 191 WL 28746, at *8-9

(N.D. Ill. Dec. 23, 1991)(Leinenweber, J.)(rejecting last predicate act rule); South Chicago Bank v. Notaro & Olsen, No.90 C 6357, 1991 U.S. Dist. LEXIS 1602, at *13 (N.D. Ill. Feb. 12, 1991)(Nordberg,J.)(same);McCool v. Strada Oil Co., 724 F. Supp. 1232, 1237-38 (N.D.1989)(Bua,J.)(same); Electronic Relays (India) Pvt. Ltd. v. Pascente, 610 F. Supp. 648, 653 (N.D. Ill. 1985)(Hart,J.)(same).

This split within our own district is representative of the split among circuit courts. Compare Rodriguez v. Banco Central, 917 F 2d 664, 665-67 (1st Cir. 1990)(adopting original discovery rule which we rejected in Berger); Bankers Trust Co. v. Rhoades, 859 F. 2d 1096, 1102 (2d Cir. 1988)(same); State Farm Mutual [end of page 5 beginning page 6] Auto Insur. Co. v. Ammann 828 F 2d 4,5 (9th Cir. 1987)(same); Pocahontas

Supreme Coal Co. v.Bethlehem Steel 828 F. 2d 211, 220 (4th Cir. 1987)(same) with Granite Falls Bank v. Henrikson, 924 F 2d 150 (6th Cir. 1991)(rejecting discovery rule in favor of modified discovery rule); Bath v. Bushkin, Gaims, Gaines & Jones, 913 F. 2d 617, 820 (10th Cir. 1990)(same); Bivens Gardens Office Bldg.,Inc. v. Barnett Bank, 906 F 2d 1546 (11th Cir. 1990)(same),cert. denied 111 S. Ct. 1695(1991); see also Keystone Insur. Co. v. Houghton, 863 F 2d 1125, 1130-31(3rd Cir. 1988)(adopting last predicate act rule in part).

In the absence od any Supreme Court or Seventh Circuit directive, we remain committed to the last predicate act rule. Strictly applying this rule, without any consideration of equitable tolling, we conclude that Bontkowski's RICO action is untimely. Bontkowski alleges that the final racketeering act

took place in April, 1982. Bontkowski filed his action over nine years after this date in November 1991. As such, his action is barred by the statute of limitations.[1]

Bontkowski urges us to adopt a new accrual formulation that would trigger the statute of limitations for civil RICO actions when the plaintiff knows or should [end of page 6 beginning page 7; footnotes are printed as end notes] know that he has a "sustainable" RICO action. According to Bontkowski's formulation, his suit is timely since he did not have a sustainable RICO action until his conviction was vacated in December , 1988, because prior to this time he was subject to the defense of in pari delicto. Of all the different positions adopted by the various federal courts regarding when the statute of limitations accrues, no court has

adopted such a sweeping rule. We similarly refuse to do so.[2]

C. Equatable Tolling of Statute of Limitations

In the alternative, Bontkowski claims that his suit is timely because of equitable tolling principles. Because we disagree, we grant National's motion to dismiss.

The equitable tolling doctrine is read into most federal statutes of limitations, including the statute of limitations for civil RICO violations. Cada v. Baxter HealthCare Corp., 920 F 2d 446, 451 (7th Cir. 1990)(Posner,J.),cert. denied. 111 S.Ct. 2916 (1991); Newman v. Wandland, 651 F. Supp. 20, 22 (N.D. Ill. 1986). "Equitable tolling does not require any conduct by the defendant." Cada, 920 F 2d at 452. The sole inquiry is whether the plaintiff "by the exercise of

reasonable diligence" could not have discovered that the defendant engaged in a "possible violation" of the law. Id. at 451-52. As Judge Posner has recently held:

> [t]he qualification "possible" is important. It a plaintiff were entitled to have all the time he needed to be certain his rights had been violated, the statute of limitations would never run--for even after judgment, there is no certainty. Id. at 451

Accepting the facts alleged in Bontkowski's complaint as true, we conclude that there is no factual basis for equitable tolling the statute of limitations. The complaint demonstrates that Bontkowski had sufficient information to conclude that his legal rights had possibly been infringed. Bontkowski alleged in his complaint that

in 1982 the government seized the stolen bonds from National, that the bank then called Bontkowski's loan, and that he lost his business and went bankrupt as a result of the bank's actions. Equally clear is that Bontkowski was indicted in 1984 with Giova, National's Vice President, Berkowitz, Brunn, and others for banking violations. Under such circumstances, it is apparent that a reasonable person in Bontkowski's position would understand that Giova, as agent of National, had engaged in illegal activities and that he "possibly" had a cause of action against National. As such, it would be inappropriate to equitably toll the statute of limitations. We therefore find Bontkowski's action to be untimely and grant National's 12(b)(6) motion.

[end of page 8 beginning of page 9]

## CONCLUSION

For the foregoing reasons, we dismiss Bontkowski's action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

/s/Charles P. Kocoras

Charles P. Kocoras

United States District Judge

Dated:February 19, 1992

1.While in Berger we explicitly rejected the original discovery approach, we did not have occasion to rule upon the efficacy of the modified discovery approach as recently adopted by the Eighth, Tenth, and Eleventh Circuit. We note that under such an approach Bontkowski's RICO action would still be barred. Bontkowski knew or should have known of his injury when his loan was called in 1982. Similarly, Bontkowski knew or should have known that a pattern of racketeering activity existed in 1984 when he, Giova, Berkowitz, and Brunn were indicted. Thus, even under the modified discovery approach, Bontkowski's action would be barred. Therefore, in light of our long-standing adherence to the last predicate act rule, the lack of guidance by the Seventh and United States Supreme Court, and the similarity in outcomes under

either accrual approach, we find it inappropriate to deviate from our holding in Berger at this time.

2.Bontkowski should have filed his RICO action against National well before the vacation of his sentence and have a court determine whether and to what extent, if any, he was subject to the defense of in pari delicto. If the court dismissed his action, as Bontkowski feared, he could have filed a Rule 60(b) motion after his conviction was vacated.

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit

Chicago, Illinois 60604

Date: August 17, 1993

**BEFORE:** Honorable Richard D. Cudahy,
Circuit Judge

Honorable Joel M. Flaum,
Circuit Judge

Honorable Michael Mihm,
Chief District Judge*

No. 92-1654

EDWARD BONTKOWSKI,

Plaintiff-Appellant

v.

FIRST NATIONAL BANK OF CICERO,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 91 C, Charles P. Kocoras, Judge

On consideration of the Plaintiff-Appellant's petition for rehearing with suggestion for rehearing en banc filed July 14, 1993 the petition for rehearing is denied. No judge in active service has voted for rehearing en banc. Rehearing en banc is denied.

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* The Honorable Michael M. Mihm, Chief District Judge of the United States District Court for the Central District of Illinois, is sitting by designation.

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit

Chicago, Illinois 60604

**JUDGMENT - WITH ORAL ARGUMENT**

Date: July 1, 1993

**BEFORE:** Honorable Richard D. Cudahy,
Circuit Judge
Honorable Joel M. Flaum,
Circuit Judge
Honorable Michael Mihm,
Chief District Judge*

No. 92-1654

EDWARD BONTKOWSKI,

Plaintiff-Appellant

v.

FIRST NATIONAL BANK OF CICERO,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 91 C, Charles P. Kocoras, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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* The Honorable Michael M. Mihm, Chief District Judge of the United States District Court for the Central District of Illinois, is sitting by designation.